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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1960

No. 547

STATE OF ALABAMA,
Petitioner,
v
TRANSCONTINENTAL GAS PIPE LINE CORPORATION,
a Corporation,
Respondent.

PETITION FOR A WRIT OF CERTIORARI

To the Supreme Court of Alabama.

MacDONALD GALLION,
Attorney General for Alabama

GUY SPARKS,
Executive Assistant to the
Commissioner of Revenue,
and Special Assistant
Attorney General

WILLIAM H. BURTON,
Counsel, Revenue Department,
and Assistant Attorney General

Counsel for the State of Alabama,
Petitioner

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IN THE

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OCTOBER TERM, 1960

No. .....

STATE OF ALABAMA,
Petitioner,

v

TRANSCONTINENTAL GAS PIPE LINE CORPORATION,
a Corporation,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
To the Supreme Court of Alabama.

Petitioner prays that a Writ of Certiorari issue to review the judgment of the Supreme Court of Alabama entered in the above-styled cause on January 14, 1960, (R. 280-293), rehearing denied on September 15, 1960 (R. 294, 298).

Citations to Opinion Below

The judgment of the Circuit Court of Montgomery County, Alabama, in Equity (R. 257-271, Appendix "E"), is unreported. The judgment and opinion of the Supreme Court of Alabama entered on January 14, 1960 (R. 280-293, 295), and rehearing denied on September 15, 1960 (R. 294, 298), is reported in 122 So.2d 281. (Printed in Appendix "A," "B," "C," and "D".)

Jurisdiction

The judgment of the Supreme Court of Alabama was entered on January 14, 1960 (R. 280-293, 295). A timely application for rehearing was filed within fifteen days and on January 29, 1960 (R. 296), and rehearing was denied on September 15, 1960 (R. 294, 298). The jurisdiction of this Court is invoked under 28 U. S. C., Section 1257 (3), in that as applied to the Respondent, a natural gas company, engaged in selling and delivering natural gas to customers in Alabama both for distribution and for direct consumption, the validity of a state statute (the Alabama foreign corporation franchise tax levied under Title 51, Section 348, as amended, Code of Alabama 1940 (Appendix "F"), has been drawn in question on the grounds that as so applied it is unconstitutional as being repugnant to the provisions of Article 1, Section 8, Clause 3, of the Constitution of the United States.

Questions Presented

1. Was the Respondent a foreign corporation, and a natural gas company within the meaning of the Federal Natural Gas Act, 15 U. S. C. 717-717W, engaged in 1956 in selling and delivering (both for distribution and in some instances for direct consumption) to customers in Alabama natural gas which was transported from without the State engaged solely in interstate commerce in Alabama during said year?

2. Was the Respondent in selling and delivering natural gas to customers in this State under such circumstances engaged solely in interstate commerce in this State so as to prohibit and preclude the State under the Commerce Clause of the

Federal Constitution from applying to the Respondent its foreign corporation franchise tax under Title 51, Section 348, as amended, Code of Alabama 1940, which is levied on the "doing of business in this state"[1] and measured by and confined to solely the amount of capital employed by such a corporation in Alabama?

Statutes Involved

The applicable provisions of the Commerce Clause of the Federal Constitution, namely, Article 1, Section 8, Clause 3, are set out in Appendix "H". The levying provisions of the Alabama foreign corporation franchise tax are contained in Title 51, Section 348, as amended, Code of Alabama 1940, which statute will be found in its entirety in Appendix "F". The provisions of the Alabama Constitution of 1901 which relates to the levy of a franchise tax on foreign corporations, are contained in the Constitution of Alabama of 1901, Article 12, Section 232 and are set forth herein as Appendix "G".

Statement

This cause originated as an appeal taken on March 27, 1958 (R. 2-3; 5-6) by the Respondent, Transcontinental Gas Pipe Line Corporation, to the Circuit Court of Montgomery County, Alabama, in Equity, under the provisions of Title 51, Section 140, Code of Alabama 1940 from a final assessment of Alabama foreign corporation franchise tax for the calendar year 1956. This assessment (R. 44-45) was made in behalf of the State by the State Department of Revenue and was in the total amount

[1] *State of Alabama v. Plantation Pipe Line Company*, 265 Ala. 69, 89 So.2d 549.

of $81,875.00. The levying provisions of the Alabama foreign corporation franchise tax are contained in Section 348, as amended, Title 51, Code of Alabama 1940, which Section is actually a projection of Article 12, Section 232, of the Alabama Constitution of 1901. (Appendix "F" and "G".)

The tax has been held to relate to a foreign corporation that "does business" in Alabama or to foreign corporations that "do any business in this State". *State v. Plantation Pipe Line Corporation*, 265 Ala. 69, 89 So.2d 549, 561, Cert. Den. 348 U.S. 943, 1 L. Ed. 2d 237. The tax is measured by and confined exclusively to the amount of capital employed by such a foreign corporation within the State of Alabama. (Appendix "F" and "G".)

The Circuit Court of Montgomery County, Alabama, in Equity, (R. 257-271) held the Respondent to be engaged exclusively in interstate commerce, and the tax as applied to the Respondent unconstitutional and void under the Commerce Clause of the Federal Constitution. The Court also vacated and set aside the final assessment on these grounds. On appeal to the Supreme Court of Alabama that Court affirmed the decision of the Circuit Court on the same grounds (R. 280-293), and denied a rehearing on September 15, 1960 (R. 294 and 298).

The issues in the case are tersely drawn in a short bill of Complaint (R. 5-6), and answer thereto (R. 7-8).

The Respondent, Transcontinental Gas Pipe Line Corporation, is a Delaware corporation, and is said to have its principal offices in Dallas, Texas. *Its primary business is the selling of gas.* (R. 9 and 10.)

Respondent is a natural gas company falling within the purview of the Federal Natural Gas Act, 15 U. S. C. 717-717W. As such it is regulated by the Federal Power Commission. (R. 9.)

In order to deliver the gas which it sells to the local markets, the Respondent owns and maintains an elaborate system of pipe lines running from its gas fields in Texas and Louisiana through Mississippi, Alabama and several other states on the eastern seaboard. (R. 139.)

Approximately 207 miles of the main pipe line and 146 miles of 30 inch loop line and 14 miles of 36 inch loop line or a total of some 367 miles of pipe line, lay within the State of Alabama in 1956. (R. 17.) Respondent had three large compressor stations located in Alabama in that year. (R. 13-16.) It had approximately 100 employees in this state who were located at said compressor stations, or who were used to maintain the lines, or who were working in the district office at Alexander City, Alabama, or elsewhere for the company in this state. (R. 14-15.)

Respondent manufactured its own electricity (11,298,938 kilowatts) in Alabama in 1956 through the use of electric generators located at its Alabama compressor stations, which electricity was used to run the pumps and compressors at said stations, and for lighting and other purposes, including the electricity used in dwelling houses maintained by Respondent for its employees at the three compressor stations. (R. 250-251, 14, 17.) The Respondent also pumped from wells and other sources in Alabama and stored in large bulk tanks at its said

three stations in this state all of the water it used commercially in this state and also for use in the dwelling houses which it maintained for employees at these stations. (R. 14-17.)

Respondent in this respect employed within the State of Alabama in 1956 capital in the total amount of, to wit, $30,000,000. It was upon said amount of capital employed exclusively in this state by the Respondent in 1956 that the tax was measured and the final assessment was made. (R. 45.)

Respondent had in 1956 some thirteen customers in Alabama in the form of municipalities to whom it continuously sold and delivered gas during said year. The greater part of the gas was sold and delivered to these customers in Alabama to be distributed and resold, *but a substantial amount was also sold to them to be consumed* and not resold.[2] (R. 248, 249, 24.)

In making the deliveries to its some thirteen customers which it had in this state in 1956, Respondent maintained off the main line twelve meter stations, where the gas was withdrawn from the main line, metered, odorized for safety purposes, otherwise treated, and the pressure reduced to a considerable degree from the main line pressure just before delivery was made to the facilities of said Alabama customers. (R. 23 and 24.)

The Respondent is not a common or contract carrier, nor does it transport the property of others. It is not regulated by the

[2] *Respondent now has one or more industrial customers in Alabama to whom it sells gas also for direct consumption and not for resale, but it was not until the year 1957 that it acquired this industrial customer or customers.*

Interstate Commerce Commission. It is engaged exclusively in transporting its own gas which it is engaged in selling.

At one point in Alabama Respondent maintains a permanent meter station where it interchanges gas with the Southern Natural Gas Company. (R. 24.) In 1956 the Respondent purchased and received through such station in Alabama 148,242,000 cubic feet of gas from Southern Natural. (R. 32.) A substantial amount of this gas was sold and delivered by the Respondent to its customers in Alabama.

Prior to the year 1956 the Respondent had voluntarily qualified to do business in the State of Alabama, and had designated with the Secretary of State a statutory agent. It had also voluntarily paid franchise taxes and permit fees to the state until the year 1956. It had some sixteen motor vehicles which it registered in the State of Alabama for the 1956 year, and it also paid ad valorem taxes, sales and use taxes, income taxes, and unemployment compensation taxes in this state for said year amounting to a total of $278,534.00. (R. 33.)

This statement, of course, does not purport to state all of the facts in the case, but it does refer to what is deemed to be the most important and material ones affecting the questions involved. For the complete facts see R. 9-34, and 35-37.

Reasons for Granting the Writ

This case involves a matter of wide concern, as the question involved is not one which confines itself alone to the State of Alabama. The status of natural gas companies, such as the Respondent in this case, who are engaged primarily in selling

natural gas in not just one but in practically all of the forty-eight states, and which transport the gas which they sell in their own pipe lines, is certainly one that is not very well settled or defined. It is also a matter calling for a construction of the Federal Constitution, and certainly one which should be finally decided by the Federal Courts.

Whether or not a natural gas company regulated by the Federal Power Commission enjoys any different status for the purpose of state taxation than persons who are engaged in selling other property or goods which are produced in one state and transported into and sold in another state is also a question involved in this case and which has not been very clearly answered in the past. It is also one that is still open for conjecture.

The Circuit Court and also the State Supreme Court in their opinions entered in this cause appear never to have quite understood the issues or all of the implications in this case. The cardinal error made by the lower courts in their decisions (R. 280-294, and 257-271, Appendix "A" and "E") was to draw an analogy between the Respondent, a natural gas company engaged primarily in selling natural gas, and certain common carriers who were engaged exclusively in transporting the property of others for hire, namely, *Plantation Pipe Line Company*,[3] *Spector Motor Service*[4] and *Ozark Pipe Line Company*,[5] among others.

[3] *State of Alabama v. Plantation Pipe Line Company*, 265 Ala. 69, 89 So.2d 549, Cert. Den. 353 U.S. 94, 1 L. Ed. 2d 239.

[4] *Spector Motor Service v. O'Connor*, 340 U.S. 602, 71 S.Ct. 508.

[5] *Ozark Pipe Line Corporation v. Monier*, 266 U.S. 555, 45 S.Ct. 184.

In those cases *Plantation Pipe Line Company*, *Spector Motor Service* and *Ozark Pipe Line Corporation* were all common carriers engaged in transporting the property of others for hire. Their sole business was said *to be transportation*, and exclusively interstate transportation. They were not engaged in selling property of any kind nor did they transport their own property, but were certificated common carriers by pipe line or by motor carrier for hire. *The state taxes attempted to have been imposed on them were said to have been directed at their activities of engaging solely in interstate transportation, and were held to be invalid under the Commerce Clause for that reason.*

> "The tax is not levied as compensation for the use of highways or collected in lieu of an ad valorem property tax. Those bases of taxation have been disclaimed by the highest court of the taxing State. It is not a fee for an inspection or a tax on sales or use. It is a 'tax or excise' placed unequivocally upon the corporation's franchise *for the privilege of carrying on exclusively interstate transportation in the State.*"
> (Emphasis supplied)

Spector Motor Service v. O'Connor, 340 U. S. 602, 607, 608, 71 S.Ct. 508, 511.

The same conclusion was also reached by the court in *State v. Plantation Pipe Line Company*, 265 Ala. 69, 89 So.2d 549, Cert. Den. 353 U.S. 94, 1 L.Ed. 2d 239, and in *Ozark Pipe Line Corporation v. Monier*, 266 U.S. 555, 45 S.Ct. 184.

These cases are clearly distinguishable from this case, and other cases involving sellers of natural gas or other commodities who transport their own products which they are engaged in selling, and transport only in order to bring their own

products to the local markets to consummate the sales there. *McGoldrick v. Berwind-White Mining Company*, 308 U.S. 60 S.Ct. 388, 128 A.L.R. 876, *Gaskey Baking Company Commonwealth of Virginia*, 313 U.S. 117, 61 S.Ct. 881, *Southern Natural Gas Company v. State of Alabama*, 301 U.S. 148, 57 S.Ct. 669, *Missouri v. Kansas Natural Gas Company*, 265 U.S. 298, 44 S.Ct. 544, *East Ohio Gas Company v. Tax Commission*, 283 U.S. 465, 51 S.Ct. 499.

> "The business of supplying, on demand, *local consumers is a local business, even though the gas is brought from another state and drawn for distribution directly from interstate mains*; and this is so whether the local distribution be made by the transporting company or by independent distributing companies. In such case the local interest is paramount, and the interference with interstate commerce, if any, indirect and of minor importance."
> (Emphasis supplied)

* *Southern Natural Gas Corporation v. State of Alabama*, 301 U.S. at page 151, 57 S.Ct. at page 696.

Missouri v. Kansas Natural Gas Company, 265 U.S. at page 309, 44 S. Ct. at page 546.

The Respondent's business is the selling of natural gas. (R. 9, 22, 24, 35-36.) *It is paid for the gas and not the transportation.* It is not of importance to customers whether the gas is delivered by the Respondent through the use of its own pipe lines or by a third party such as a common carrier for hire. It is true that as a matter of economics the transportation is one of the factors which is considered in fixing the price of the gas, but it is clearly the gas that the customer buys and pays for and not the transportation. Moreover, the delivery of the gas within the state consummates the sale. *McGoldrick*

Vermilion-White Coal Mining Company, 309 U.S. 33, 60 S.Ct. 388, 84 L.Ed. 565, 128 A.L.R. 870.

The Supreme Court of Alabama in its decision in *Santora Service Company v. City of Andalusia*, 256 Ala. 507, 55 So.2d 356, has practically paraphrased the expressions of this Honorable Court in its decision in the *Goldfield* case, by holding:

> "The result is controlled, as we have said, by the fact that the petitioner *was obligated by contract to deliver* the goods into the possession of his customer and in his tanks in the City of Andalusia, and the sale was not complete until that occurred. *Such delivery was a feature of the sale*, not the transportation." (55 So.2d at page 360.) (Emphasis supplied)

These points are also emphasized by the able commentator in speaking of natural gas companies and other public utilities in *Powell's Notes*, 58 Harvard Law Review, at page 1084, as follows:

> "Here the utility has the dual characteristics of carrier and vendor. If it owns what it carries as in the case of electricity it usually if not always does, *its receipts are from sales and not from transportation* even though the transportation enhances the sales price."
> (Emphasis supplied)

And on the same page:

> "... the actual service for which the vendee pays, whether consumer or distributor, *is the supply of the commodity*." (Emphasis supplied)

In *Memphis Natural Gas Company v. Stone*, 335 U.S. 80, 68 S.Ct. 1475, the company (also a natural gas company) maintained 135 miles of pipe line in the State of Mississippi, which

was a component part of its pipe line running from the gas fields in Louisiana through Mississippi to Memphis and other points in Tennessee and into Arkansas. The company had but one customer in Mississippi, the Mississippi Power and Light Company, to which it sold gas from its interstate pipe line at wholesale (obviously under contract and subject to regulation by the Federal Power Commission) to its said Mississippi customer. (335 U.S. 80, 81) In that case this Court held that "the local activities in maintaining, keeping in repair, and otherwise manning the facilities of the system throughout the 135 miles of its line in this state," was a sufficient nexus or local event, apart from the transportation in interstate commerce, at which Mississippi could validly direct and apply its franchise tax. Mississippi's tax in that instance was also said to be a tax upon the "doing of business" within the state, and was, like the Alabama tax, measured by the amount of capital employed or used by the foreign corporation within the state.

We do not know in what regard this Court holds the *Memphis Natural Gas Company* case at this time, but we do wish to point out that this Court has cited the case with authority in some of its most recent pronouncements, including the case of *Spector Motor Service v. O'Connor*, supra, where taxable local activities are referred to. (340 U.S. at pages 609 and 610, 71 S.Ct. at pages 512 and 513.)

It will also be noted (R. 250-251, and 14 and 17), that the Respondent manufactured in Alabama its own electricity, amounting to 11,298,938 kilowatts in 1956, through the use of electric generators which were located at its three Alabama compressor stations. The electricity so generated and manu-

factured in Alabama by the Respondent in 1956 was used to run the pumps and compressors at said stations, for lighting and other purposes, including the electricity used in dwelling houses maintained by Respondent for its employees at said three compressor stations. In the case of *Coverdale, Sheriff, v. Arkansas-Louisiana Pipe Line Company*, 303 U.S. 604, 58 S.Ct. 736, this Honorable Court held that such activity alone was a sufficient nexus or local business event, apart from the interstate transportation in that case, at which the State of Louisiana could validly levy a license tax on the privilege of producing mechanical power within the state, although all of the power so manufactured was used in connection with the taxpayer's interstate pipe line.

Recent decisions of this Court also give rise to the question of how far one can go in the matter of immunity from state taxation of interstate commerce, which has intrastate aspects considering the benefits and protection granted by the states to those corporations which fall in that category. *Scripto, Inc. v. Carson* (decided March 21, 1960), 80 S.Ct. 619, *Williams v. Stockham Valves & Fittings, Inc.*, 358 U.S. 450, 79 S.Ct. 357, *Northwestern States Portland Cement Company v. State of Minn.*, 358 U.S. 450, 79 S.Ct. 357, *E. T. & W. N. C. Transportation Company v. Currie*, 359 U.S. 604, 79 S.Ct. 602, Affirming 248 N. C. 560, 104 S. E. 2d 403, *Wisconsin v. J. C. Penney Company*, 311 U.S. 435, 61 S.Ct. 246, *International Shoe Company v. Washington*, 326 U.S. 310, 66 S.Ct. 154, *Southern Natural Gas Company v. State of Alabama*, 301 U.S. 148, 57 S.Ct. 696, *Western Livestock Company v. Bureau of Revenue*, 303 U.S. 250, 254, 58 S.Ct. 546.

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> "*The taxes imposed are levied only on that portion of the taxpayer's net income which arises from its activities within the taxing State.* These activities form a sufficient 'nexus between such a tax and transactions within a state for which the tax is an exaction'. *Wisconsin v. J. C. Penney Co., supra,* at 445. *It strains reality to say, in terms of our decisions,* that each of the corporations here was not sufficiently involved in local events to forge '*some definite link, some minimum connection. . .*'." (Emphasis supplied)
>
> *Northwestern States Portland Cement Company v. State of Minn.*, 358 U.S. 450, 464, 465, 79 S.Ct. 357, 365, 366.

The Alabama franchise tax on foreign corporations, Title 51, Section 348, as amended, Code of Alabama 1940 (Appendix "E") is a very similar tax to the income taxes involved in some of the cases just above cited or the sales tax or the use tax involved in *Scripto, Inc. v. Carsons*, supra.

It has been held to be a tax on the "doing of business" or on foreign corporations which "do any business in this state." *State v. Plantation Pipe Line Company*, supra, (69 So.2d at page 561). And it is measured or computed only on the basis of just the amount of capital which such a corporation employs within the State of Alabama.

The Alabama foreign corporation franchise tax then is not a "lump sum license" or condition precedent to doing business in Alabama. It is clearly apportioned and limited to the actual amount of capital employed by a foreign corporation in Alabama. It is certainly not discriminatory as it applies to all foreign corporations which do "any business" in this state.

comparable tax is levied on all domestic corporations. See Title 51, Sections 25 and 347, as amended, Code of Alabama 1940.

The tax then is not strictly speaking a franchise (a right or license to enter and to do a certain thing in this state) nor is it a lump sum license (giving some special right or privilege). It is merely a tax levied on a foreign corporation when such corporation does any business in the state for the protection and privileges afforded by the state. The tax is also collected in the usual way that other taxes are collected and enforced.

Hollingsworth & Whitney Company v. State, 241 Ala. 96, 1 So.2d 387.

State v. Plantation Pipe Line Company, 265 Ala. 60, 89 So.2d 549.

Memphis Natural Gas Company v. Stone, 335 U.S. 80, 67 S.Ct. 1475.

We, therefore, respectfully submit that such a tax directed at that part of the Respondent's business which takes place in Alabama, namely, and mainly, the continuous sales of natural gas which Respondent made to its thirteen customers in Alabama in 1956, and measured by and apportioned to just the amount of capital employed by the Respondent in this state, appears to have been repeatedly upheld by this Honorable Court.

Scripto, Inc. v. Carsons (1960), 80 S.Ct. 619.

Northwestern States Portland Cement Company v. State of Minnesota, 358 U.S. 450, 79 S.Ct. 357.

Field Enterprises, Inc. v. State of Washington, 352 U.S. 806, 77 S.Ct. 55, 1 L.Ed. 2d 39, affirming 289 P. 2d 1010, 1012.

Berkshire Fine Spinning Associates v. City of New York, 80 S.Ct. 86 (1959), dismissing for want of a federal question 157 N.E. 2d 614.

Southern Natural Gas Company v. State of Alabama, 301 U.S. 148, 57 So.2d 696.

Memphis Natural Gas Company v. Stone, 335 U.S. 80, 68 S.Ct. 1475.

McGoldrick v. Berwind-White Coal Mining Company, 309 U.S. 33, 60 S.Ct. 388.

Missouri v. Kansas Gas Company, 265 U.S. 298, 309, 44 S.Ct. 544.

Western Livestock Company v. Bureau of Revenue, 303 U.S. 250, 58 S.Ct. 546.

Decisions Under the Federal Natural Gas Act

The decisions of the lower courts even disregard the provisions of the Federal Natural Gas Act, 15 U. S. C. 717, if such Act can be said to be at all applicable to the state tax field. This Act is first and primarily a regulatory law. It is doubtful that it applies to taxation at all, or that the Congress under the Act has chosen to enter anything more than the regulatory field.

Notwithstanding Section 1(b) of the Act, 15 U. S. C. 717(b), confines the application of the Act to sales made in interstate commerce for resale. It expressly excludes sales made for direct consumption and not for resale. *Panhandle Eastern Pipe Line Company v. Public Service Commission of Indiana*, 332 U.S. 507, 68 S.Ct. 190.

The undisputed evidence in this case shows that at least a substantial amount of the natural gas sold by the Respondent

in Alabama in 1956 was sold for direct consumption and not for resale (R. 35-36, 248-249). The records of most of these purchasers in Alabama have also been kept to show a breakdown between the gas distributed and the gas directly consumed and not resold. (R. 35-36.)

Whether a state can tax sales made at wholesale to customers in Alabama (or in any of the other states), where the delivery is made in Alabama directly to such wholesale customers by natural gas companies which are engaged in the business of selling gas in Alabama, is certainly an open question. It is also one, considering the rights of the states under the Constitution, that is certainly not clearly answered under the Federal Natural Gas Act, but would better appear to be governed by the general taxing powers given the states, as balanced against other provisions of the same Constitution.

Several of the recent cases of this Court including *Scripto, Inc. v. Carson*, supra, *Northwestern States Portland Cement Company v. State of Minnesota*, supra, *Memphis Natural Gas Company v. Stone*, supra, among others heretofore cited, seem to clearly make no distinction between wholesale and retail sales, and clearly indicate that the states can validly tax or direct a tax where a sufficient "nexus" exists in the taxing state, at sales made therein without regard to a distinction between retail and wholesale sales. Some of these cases also strongly indicate that continuous sales made day after day or month after month clearly constitute doing business in the state, and actually is equivalent to having a place of business in the state, and certainly constitutes a sufficient "nexus" to associate such sales with the taxing state.

International Shoe Company v. Washington, 326 U.S. 310, 66 S.Ct. 154.

West Publishing Company v. McColgan, 328 U.S. 823, 66 S.Ct. 1378.

Scripto, Inc. v. Carson (decided March 21, 1960), 80 S.Ct. 619.

However, the Natural Gas Act for regulatory purposes does clearly recognize that sales made by such companies directly to the consumer and not for resale are local activity.

In *State of North Dakota v. Federal Power Commission*, 247 Fed. 2d 173, and at page 177, the United States Court of Appeals, Eighth Circuit, observed that, while the Natural Gas Act does not embrace intrastate commerce, *it is clear that a natural gas pipe line company can be engaged in both intrastate as well as interstate business, and the intrastate portion of its business not be subject to* Federal Power Commission jurisdiction. See also *Colorado Interstate Gas Company v. Federal Power Commission*, 324 U.S. 581, 585, 65 S.Ct. 829.

This would certainly strongly also indicate that by virtue of their taxing powers under the Constitution that the states could without a doubt validly tax sales made directly to the consumer and not for resale or can validly direct and apply the tax at one engaged in the business of continuously making such sales in the taxing state.

Powell's Notes, 58 Harvard Law Review, 1072, 1082.

Panhandle Eastern Pipe Line Company v. Public Service Commission, 332 U.S. 507, 68 S.Ct. 190, 195.

International Shoe Company v. Washington, 326 U.S. 310, 66 S.Ct. 154.

The evidence in this case clearly shows in most instances the actual amount of gas used and consumed by the purchaser is distinguished from the amount resold or distributed. (R. 96.)

> "The Supreme Court has from the beginning allowed the state both to tax and fix the price on the first sale or delivery of gas or electricity brought in from a sister state when and if this first sale is also necessarily the last sale because consummated by consumption." (Emphasis supplied)
>
> Powell's Notes, 38 Harvard Law Review, 1072, 1083, and cases cited

See also in this respect

Pennsylvania Gas Company v. Public Service Commission, 252 U.S. 23, 40 S.Ct. 279

Panhandle Eastern Pipe Line Company v. Public Service Commission, 332 U.S. 507, 517-519, 68 S.Ct. 190.

Panhandle Eastern Pipe Line Service vs Mich. Public Service Commission (1951), 341 U.S. 329, 71 S.Ct. 777.

Panhandle Eastern Pipe Line v. Federal Power Commission, (Court of Appeals, 3d Cir., 1956) 232 F.2d 467, 471, 473.

Kansas-Nebraska Natural Gas Company v. City of St. Edwards, Neb., (8th Cir. 1956) 234 F.2d 436, 440, 441

State of North Dakota v. Federal Power Comm. (8th Cir. 1957) 247 F.2d 173, 177, 178.

The extent of the Federal control in the sale of natural gas, for regulatory purposes under the Natural Gas Act is clearly

outlined by this Court in the *Panhandle Eastern Pipe Line* case, supra, (68 S.Ct. at p. 195), as follows:

> "*The omission of any reference to other sales, that is, to direct sales for consumptive use*, in the affirmative declaration of coverage was not inadvertent. It was deliberate. For Congress made sure its intent could not be mistaken by adding the explicit prohibition that the Act 'shall not apply to any other . . . sale' (but sales for resale or wholesale sales) . . . ." (Emphasis supplied)

In the *Panhandle Eastern Pipe Line case, supra, this Court held that all sales made to industrial users or otherwise for direct consumption* and not for resale, were excluded from Federal control.

This Court in refuting the Appellant's contentions to the contrary in that case held:

> "The exact opposite is the fact. Congress, it is true, occupied a field. But it was meticulous to take in territory which this Court had held that the states could not reach. *That area did not include direct consumer sales, whether for industrial or other uses.* Those sales had been regulated by the State and the regulation had been repeatedly sustained. *In no instance reaching this court had it been stricken down.*" (Emphasis supplied)

In *East Ohio Gas Company v. Tax Commission of Ohio*, supra, this Court upheld an Ohio license tax levied on one engaged in the business of supplying to consumers natural gas for heat, light, etc., purposes, where the company made sales direct to consumers and not for resale, although the gas was transported in interstate commerce.

In so holding, the Court said:

> "The business of supplying, on demand, local customers is a local business, even though the gas be brought from another state and drawn for distribution directly from the interstate mains; *and this is so whether the local distribution be made by the transportation company or by independent distributing companies. In such case the local interest is paramount, and the interference with interstate commerce, if any, indirect and of minor importance.*" (Emphasis supplied)

The case of *State Tax Commission of Mississippi v. Interstate Gas Company*, 284 U.S. 41, 52 S.Ct. 62, involved only wholesale sales, or sales for resale. In that case the *Interstate Natural Gas Company* sold only at wholesale, or to "distributors" for resale; there were no sales involved made directly to consumers. Its doctrine also appears to have been considerably weakened if not overturned by the Court's later decisions in *Memphis Natural Gas Company v. Stone*, 335 U.S. 80, 68 S.Ct. 1475, *Southern Natural Gas Company v. Alabama*, 301 U.S. 148, 57 S.Ct. 696, *Stone v. Interstate Natural Gas Company* (C. of A. 5th Cir.) 103 F.2d 544, 549, Aff'd. per curiam in *Interstate Natural Gas Company v. Stone*, 308 U.S. 522, 60 S.Ct. 292.

The latest pronouncements of the Federal Courts, including the case of *State of North Dakota v. Federal Power Commission* (8th Cir., 1957) 247 F.2d 173, 177, 178 give sanction to the long line of decisions which hold deliveries and sales made directly to consumers and not for resale to be local events apart from interstate commerce even though the deliveries are made and the sales consummated at the end of an interstate journey.

In the *North Dakota* case the Court held in this respect (247 F. 2d at pages 177 and 178, as follows:

> "That the Act (speaking of direct sales for consumption) does not embrace intrastate commerce is clear from the act itself and from judicial interpretation thereof. (Citing among other cases, *Panhandle Eastern Pipe Line Co. v. Public Service Commission*, 332 U.S. 507, 68 S.Ct. 190)."

And then again on page 177 of 247 F.2d:

> "That gas pipe line companies can be engaged *in both intrastate as well as interstate* business . . ., and have the intrastate business not subject to Federal control is now well settled." Citing *Colorado Interstate Gas Company v. Federal Power Commission*, 324 U.S. 581, 65 S.Ct. 829. (Emphasis supplied)

This unbroken line of authorities appears to have removed all doubt concerning the right of the state to levy this tax as directed at that part of the Respondent's business in Alabama of making said sales for direct consumption and not for resale.

Conclusion

For the above and foregoing reasons, it clearly appears that the lower courts have grievously erred in their decisions in this cause, and that there is clearly a very substantial Federal question involved, and that this petition for writ of certiorari should be granted.

Respectfully submitted,

MacDONALD GALLION,
Attorney General of Alabama

GUY SPARKS,
Executive Assistant, Department of Revenue, and Special Assistant Attorney General of Alabama

WILLIAM H. BURTON,
Assistant Counsel, Department of Revenue, and Assistant Attorney General of Alabama

Counsel for the Petitioner, State of Alabama

Proof of Service

We, MacDonald Gallion and William H. Burton, two of the Attorneys for the Appellee, State of Alabama, in this cause hereby certify that on the _____ day of November, 1960, we served copies of the foregoing petition for a writ of certiorari and supporting papers on the Honorable Sam M. Johnston, Johnston, McCall and Johnston, Attorneys at Law, Box 771, Mobile, Alabama, and upon the Honorable E. T. Brown Jr., Cabaniss & Johnston, Attorneys at Law, First National Building, Birmingham 3, Alabama, as Counsel for the Respondent, Transcontinental Gas Pipe Line Corporation, by mailing copies of same to them in a duly addressed envelope, with first class postage prepaid, United States mail.

MacDONALD GALLION,
Attorney General for Alabama

WILLIAM H. BURTON,
Assistant Attorney General for Alabama
201 Administrative Building, Montgomery
Alabama

Counsel for the Appellee

Appendix "A"

January 14, 1960

THE STATE OF ALABAMA, JUDICIAL DEPARTMENT

THE SUPREME COURT OF ALABAMA

OCTOBER TERM, 1959-60

3 Div. 865

The State of Alabama

v.

Transcontinental Gas Pipe Line Corporation,
A Corporation

Appeal from Montgomery Circuit Court,
In Equity

SIMPSON, JUSTICE.

The State Department of Revenue made an assessment for franchise taxes under the provisions of Sec. 348, Title 51, Code of 1940, as amended, covering the tax year 1956 against Transcontinental Gas Pipe Line Corporation, a corporation. From this final assessment the appellee appealed to the Circuit of Montgomery County, Alabama, in Equity, under the provisions of Title 51, Sec. 140, Code of Alabama 1940. The case was submitted in the lower court on the bill of complaint and answer; a written stipulation and agreed statement of facts and exhibits thereto; the testimony of one witness and the oral arguments and briefs filed by counsel. From the final decree rendered in favor of Transcontinental Gas Pipe Line Corporation the State prosecutes this appeal.

The facts as found by the trial court are as follows: Appellee was in 1956 and prior thereto a corporation organized under the laws of Delaware. It was in 1956, and at all times has been, a natural gas company in interstate commerce within the meaning of the Act of Congress known as the Natural Gas Act, 15 U.S.C. 717-717w, and subject to the jurisdiction of the Federal Power Commission, operating in Alabama and other states solely under certificates of public convenience and necessity issued by the Federal Power Commission. Appellee has never sought certificates of public convenience and necessity from, or approval of its rates and tariffs by, the State of Alabama or any other State, and the State of Alabama has never asserted any regulatory authority or jurisdiction over any of its rates or practices.

During 1956 appellee owned and operated an interstate natural gas transmission system extending approximately 3,087 miles from sources of gas supply in Texas and Louisiana through the States of Mississippi, Alabama, Georgia, South Carolina, North Carolina, Virginia, Maryland, Pennsylvania, and New Jersey to a terminus at New York City. Some 353 miles of this pipeline were located in Alabama.

As the gas transported by the appellee moved through the interstate transmission line, its pressure was gradually lost by friction, requiring the use of compressor stations located at intervals to increase the pressure so that the gas would continue to move. Three compressor stations were owned and operated by appellee in Alabama in 1956. Each compressor station was comprised of several buildings and facilities. At each appellee used gas from its main pipeline as fuel for

compressor engines and for heating offices, shops and warehouse facilities and houses. The appellee used gas from its main lines to provide fuel for engines which generated electricity which was also used at its stations. It procured water from rivers, creeks, etc. close to each station in Alabama. It maintained one or more large tanks at each station for water for domestic and personal use at all buildings which were a part of the station, and at two of the stations maintained tanks for water necessary for the operation of the station.

In order to assure the operation of each compressor station, it was necessary for trained persons to be readily available for duty at all times. For this purpose appellee maintained houses at the various stations and required that the superintendent and repair foreman of each station occupy a house. The other houses were occupied by persons highly skilled in the operation of the station. The houses at the stations were occupied by employees of appellee who paid rent of $10.00 a month which was less than the annual depreciation. The appellee furnished without charge to each house electricity generated by it and gas and water from the domestic supply.

The order of the Federal Power Commission granting appellee its certificate of public convenience and necessity provided that "Transcontinental is authorized to transport and sell natural gas in interstate commerce" to certain companies and communities, including some in Alabama, and that "Transcontinental shall not transport or sell natural gas to or for any customer except as authorized herein". From time to time the F.P.C. ordered appellee to serve additional municipal corporations in Alabama. During 1956 appellee sold gas in Alabama to

no person, firm or corporation except thirteen municipalities. The sale of gas to each was pursuant to and in conformity with orders of the F.P.C. entered in response to petitions of the purchasers or their official representatives seeking mandates directing the sales, and facilities used for deliveries were constructed pursuant to and in conformity with orders of the F.P.C. Orders of the F.P.C. forbade the delivery by appellee of gas to the buyer at a pressure less than 50 pounds per square inch gauge. At no time was gas delivered at a pressure less than 50 pounds per square inch gauge, but was always delivered at a pressure substantially higher than 50 pounds per square inch gauge. In order to be useable it was necessary to reduce the pressure substantially from the pressure at which it was delivered by appellee.

During 1956 appellee owned and operated 12 meter stations designed to measure gas delivered to municipalities located in Alabama. Every meter station was as near the main pipeline as prudent engineering, reasonable accessibility and accepted safety practices would permit. All but three of such meter stations were within 100 feet of the pipeline, and the remaining ones were within 210 feet. All facilities to the point of delivery were owned by appellee. All facilities after the point of delivery were owned by the purchaser.

The gas purchased in 1956 by each municipal corporation in Alabama was purchased primarily for resale with small quantities of it being used and consumed by each purchaser. No municipal corporation used more than 2% of the gas purchased.

It was necessary for each municipality purchasing gas from appellee to reduce the pressure of the gas below the pressure at delivery before using it or reselling it.

All other activity of appellee in 1956 was found by the trial court to be an integral and necessary part of either the construction or maintenance of its interstate transmission system. It maintained an integrated VHF mobile and microwave radio-telephone communication system in this regard; it rented buildings to house work equipment; it rented for approximately two weeks a small office in connection with its authorized construction; it stored pipe which was used in the construction; it maintained small bank accounts in each of four banks in Alabama in connection with the construction of its transportation system.

In 1952 the F.P.C. at the instance of appellee and Southern Natural Gas Company, a Delaware corporation, issued certificates of public convenience and necessity to each corporation authorizing Southern and appellee to construct and operate facilities for the exchange or sale or delivery of natural gas between Southern's pipeline system and appellee's pipeline system. These facilities were, in the language of the F.P.C. order "proposed to be used in the transportation and sale of natural gas for resale in interstate commerce". The two companies entered into contracts whereby each agreed to sell or buy gas from the other. During 1956 appellee sold no gas to Southern in Alabama. During the period from May 17, 1956 and ending May 19, 1956, and the period beginning June 29, 1956 and ending June 30, 1956, Southern, pursuant to the aforesaid contract, sold gas to appellee in Alabama. Appellee purchased gas from Southern in May and June, 1956, due to a temporary shutdown of its transmission system west of Alabama on account of construction or relocation of its system. During these periods Southern sold appellee a total of 148,242 MCF of

natural gas for which appellee paid $31,068,900. All of the natural gas sold in Alabama in 1956 by Southern to appellee was produced in states other than the State of Alabama and brought into Alabama from such other states by Southern's pipeline system. The pressure of the gas was not reduced in the course of the delivery from Southern's system to appellee's system.

The trial court found that appellee has never maintained any general or corporate office in Alabama, nor has it any personnel located in this state who are authorized to solicit business, accept contracts for purchase or sale of gas, settle or adjust accounts, determine managerial policy, or otherwise perform management functions other than those relating solely to the operation, construction, and maintenance of its transmission system.

All records kept by appellee in Alabama during 1956 were found to be only those records pertaining to its interstate transmission system. All employees of appellee were those engaged solely and directly in the service of constructing maintaining or operating its interstate system.

Appellee paid all ad valorem taxes assessed by proper state authorities on its property located in Alabama, income taxes to the State of Alabama on its net income allocated to business done in Alabama, sales or use taxes on all tangible personal property purchased or used in its interstate activities in Alabama, and unemployment compensation taxes with respect to its employees in Alabama.

The questions involved in this case are:

1. Does The Alabama Foreign Corporation Franchise Tax apply to a foreign corporation engaged solely in *interstate* commerce in Alabama?

2. If the tax is applicable to a foreign corporation doing solely an interstate business in this state, is it violative of the commerce clause of the Federal constitution?

3. Was Transcontinental Gas engaged solely in interstate commerce in Alabama in 1956?

The first of these questions has been answered in the negative in *State v. Plantation Pipe Line Company*, 265 Ala. 69, 89 So. 2d 549, where this court after reviewing the history of the Foreign Corporation Franchise Tax law of this state held:

"The Alabama franchise tax on foreign corporations is not applicable to foreign corporations doing an exclusively interstate business in Alabama."

There is no occasion, then, to consider anew the second question outlined above. It, too, has been answered in the *Plantation* case, *supra*.

This brings us to the primary issue in the case, and the one most strongly contested by the parties, the State contending that Transcontinental Gas Pipe Line Corporation was in fact doing an intrastate business in Alabama in 1956 and is therefore subject to the Foreign Corporations Franchise Tax. Appellee contends it engaged exclusively in an interstate business in Alabama in 1956 and is not subject to the tax. With respect to this issue the lower court concluded that Transcontinental was engaged solely in interstate commerce in

Alabama in 1956. Every activity carried on by appellee was found by the trial court to be a necessary, inherent and integral part of the interstate transmission of natural gas or the construction of facilities for such transportation. The trial court was of the opinion that this case is controlled by the decision in the *Plantation Pipe Line* case, *supra*.

The facts of that case were summarized by the court as follows:

> "Plantation Pipe Line Company is a corporation which was organized under the laws of the State of Delaware on July 8, 1940. . . . . .
>
> "Plantation Pipe Line Company qualified to do business in Alabama in 1941. . . . . .
>
> "Plantation Pipe Line Company has never filed nor sought approval of its rates and tariffs by the State of Alabama or any other state and the State of Alabama has never asserted any regulatory authority or jurisdiction over any of the rates or practices of the Plantation Pipe Line Company.
>
> "During the year 1952 Plantation Pipe Line Company owned and operated a pipe line running from Baton Rouge, Louisiana, to Greensboro, North Carolina with lateral lines from Helena, Alabama, to Birmingham and Montgomery, Alabama, and from Bremen, Georgia, to Columbus and Macon, Georgia, and to Chattanooga and Knoxville, Tennessee. The length of the lines, with laterals, was approximately 1,968 miles, of which approximately 483 miles were located in Alabama. The total investment in carrier property, including construction work in progress as of January 1, 1952, was approximately $69,615,442.47 for the entire system and within the State of Alabama on the same date was approximately $17,095,063.34. . . . . .

"After the products are pumped into the pipe line at Baton Rouge, the flow gradually slows down as the product moves, requiring the use of pumps located at intervals to maintain the flow. Three pumping stations were operated in Alabama in 1952 with stand-by facilities at four points in the State of Alabama.

"Plantation Pipe Line Company had four delivery terminals in Alabama in 1952, at Moundville, Birmingham, Montgomery and Oxford. It did not make delivery of any products shipped through its pipe line at any point in Alabama other than at these terminals. This was in conformity with its tariff. Plantation did not maintain any storage tanks at any delivery terminal or elsewhere in Alabama. As required by the tariff, shippers receive their products from the pipe line without delay. . . . . .

"In order to assure uninterrupted operation of the pipe line, it is necessary that the person in charge of each pumping station and stand-by facility be on duty or on call at all times and for this purpose the company maintains at each station one house which it required the responsible employee to occupy and for which he is charged rent in an amount less than the annual depreciation and repairs.

"At each of the operating pumping stations there is a water tank primarily for fire protection. Water from the tank is never sold commercially but is used, incidentally and without charge, by employees at the pumping station and in the company house.

"The company maintains at Helena a warehouse where are stored maintenance materials for the operation of the pipe line. It also maintains a fire truck at Helena.

"Plantation Pipe Line Company had 82 employees in Alabama on January 1, 1952, and 68 on January 1, 1953. The only employees in Alabama in 1952 were those engaged solely and directly in the service of constructing, maintaining and operating the pipe line. The

company had three trucks at Akron, and a truck at Helena and Silver Run in 1952, which were used only to carry employees from place to place in connection with their work in the construction, maintenance and operation of the pipe line, to carry needed supplies and for other purposes directly connected with the construction, maintenance and operation of the pipe line.

"Some construction was carried on in 1952 by an independent contractor consisting of enlarging the pumping facilities on the main lines. Similar work was done at Helena in 1951 and some clean-up work in connection with such construction was done at Helena in 1952.

"To keep its pipe line system in operation Plantation Pipe Line Company maintained by means of lines leased from others a communications system between its terminals, pumping stations, and its chief operating office in Atlanta. Plantation Pipe Line Company has never maintained any general or corporate office in Alabama. Its statutory domicile is and has been in Atlanta, Georgia. Plantation Pipe Line Company has never kept any records in Alabama except pumping station and terminal operating records necessary to the transportation of products received into the pipe line in Louisiana. It has never performed any functions in Alabama except those of constructing, maintaining and operating the pipe line." 262 Ala. at 74-76, 89 So. 2d at 551-553.

This court held that Plantation was not doing local business in Alabama and was not subject to the Foreign Corporations Franchise Tax.

The State in this case contends that there are controlling factual differences between the *Plantation* case, *supra*, and the present case, and that these differences demand that a different result be reached. The appellee contends that there are

material differences between the facts of this case and those presented in the *Plantation* case. The trial court was of the opinion that the *Plantation* case was controlling, but went on to answer categorically the State's contentions. We, too, will consider them:

A. Does the fact that appellee reduced the pressure of the gas somewhat before delivery to the various municipalities to which it was sold constitute doing a local business in Alabama? Reduction in pressure before delivery was held not to change the character of the company's interstate activities in *Mississippi River Fuel Corporation v. Hoffman*, 4 111 2d 468, 123 N. E. 2d 503, cert. den. 349 U.S. 935, 99 L.Ed. 1264, and in *Gay v. United Gas Pipe Line Company*, 159 Fla. 659, 32 So. 2d 600, where the gas was not produced in the taxing state. It should be remembered that although appellee reduced the pressure somewhat before delivery, it was necessary for the purchaser to further reduce it before it could be used or resold.

B. The State contends that the fact that some of the gas brought by the municipalities was consumed by the municipality (not more than 2% of the amount purchased by each) constitutes intrastate activity on the part of appellee. The sale and transportation of the gas is interstate commerce when furnished to local utilities for resale. *Panhandle Eastern Pipe Line Company v. Public Service Commission of Indiana*, 332 U. S. 507, 926 L. Ed. 128. The fact that a small percentage of the gas transported and sold by appellee was consumed by the purchaser does not change the nature of the act of selling and transporting. The transportation and sale, as we see it, is in

interstate commerce under the decision in *Panhandle Eastern Pipe Line Company v. Public Service Commission of Indiana, supra.*

C. The State contends that the fact that the company in the *Plantation* case was a common carrier while the appellee is not (the appellee transporting its own gas) dictates a different result in this case. The trial court was of the opinion, and we are agreed, that commerce is not limited to transportation. In the language of the trial court: "Persons transporting their own product, gas, which they sell, can be, and are, engaged exclusively in interstate commerce" citing *Mississippi River Fuel Corporation v. Hoffman, supra; Texas Gas Transmission Corporation v. Atkins*, 197 Tenn. 123, 270 S.W. 2d 384, cert. den. 348 U.S. 883, 99 L. Ed. 694; *Gay v. United Gas Pipe Line Company, supra;* and *Panhandle Eastern Pipe Line Company v. Public Service Commission of Indiana, supra.* It was held that gas companies transporting natural gas which they owned and which was sold to local utilities for resale, and to industrial customers for consumption, were engaged exclusively in interstate commerce.

We think there is no merit to the State's contention that the fact that appellee bought gas from Southern Natural Gas Corporation in 1956 constitutes doing a local business in this state. The trial court found that all the gas bought by appellee from Southern was produced in states other than Alabama; the pressure of the gas was not reduced before transmission to appellee's system and the interstate movement of it was never interrupted. We agree with the trial judge that *Coverdale v. Arkansas-Louisiana Pipe Line Company*, 303 U.S. 691, 82 L.

Ed. 1023 (1938) is not controlling here, inasmuch as the gas in that case *was produced in the taxing state* and the incidence of the tax in that case is not the same as that involved here. We are dealing here with a tax based upon "doing a local business" in Alabama -- there the tax was based upon the operation of prime movers.

We are of the opinion that the facts of this case indicate that appellee was engaged exclusively in interstate commerce in Alabama in 1956. - *Spector Motor Service, Inc. v. O'Connor*, 340 U.S. 602, 95 L.Ed. 573; *Ozark Pipe Line Corporation v. Monier*, 266 U.S. 555, 69 L.Ed. 439; *United Air Lines, Inc. v. Joseph*, 282 App. Div. 48, 121 N.Y. Supp. 2d 692, aff'd 307 N.Y. 762, 121 N.E. 2d 557.

We find no controlling difference between the facts here and the facts of the *Plantation* case, *supra*, decided by this Court in 1956. We entertain the view, therefore, that the decision of the trial court was correct.

Affirmed

Livingston, C. J., Goodwyn and Coleman, J. J., concur.

Appendix "B"

Judgment of Supreme Court of Alabama

Thursday, January 11, 1968

Came the parties by Attorneys, and the record and matters therein assigned for errors, being submitted on briefs in lieu of oral argument, and duly examined and understood by the Court, it is considered that in the record and proceedings of the Circuit Court, In Equity, there is no error.

IT IS THEREFORE CONSIDERED, ORDERED, ADJUDGED AND DECREED that the decree of the Circuit Court, in Equity, be and is hereby in all things affirmed.

IT IS FURTHER CONSIDERED, ORDERED, ADJUDGED AND DECREED that the appellant, The State of Alabama, pay the costs of appeal of this Court and of the Circuit Court, In Equity, for which costs let execution issue accordingly.

Appendix "C"
Opinion of State Supreme Court Extended on Rehearing

3 Div. 865

State of Alabama

v.

Transcontinental Gas Pipe Line

On Rehearing

SIMPSON, J.

At the earnest request of the ever zealous assistant attorney general, we postponed consideration of the State's application for rehearing, pending final disposition by the United States Circuit Court of Appeals (5th Circuit) of the cases of *Ideal Cement Co., appellant, versus United Gas Pipe Line Co., appellee*, No. 18103 and *Scott Paper Co., appellant, versus United Gas Pipe Line Co., appellee*, No. 18118.

The United States District Court held that the taxable event in those cases was an intrastate transaction, and it was thought by appellant that these federal cases would be persuasive to grant the rehearing in the case at bar, should the Circuit Court of Appeals affirm. There were some factual differences between the *United* cases and *Transco*, but we agreed to the postponement of action on the State's rehearing in the case at bar pending the decision by the Circuit Court of Appeals.

The Circuit Court of Appeals on September 2, 1960 reversed the District Court, holding in effect that the transaction

described in the *Yates* cases was interstate. The holding in these cases is, therefore, persuasive of the correctness of our holding in *Transco*.

We therefore adhere to the holding of our original opinion and overrule the application for rehearing.

Opinion extended and rehearing denied.

Livingston, C. J., Goodwyn and Coleman, J. J., concur.

Appendix "D"

Order of State Supreme Court Denying Rehearing

Order of State Supreme Court Denying Rehearing

IT IS ORDERED, that the application for rehearing filed by the appellant in this cause on January 29, 1960, after being duly examined and understood by the Court, be and is hereby overruled; and the opinion as originally announced is extended by writing page 17 "On Rehearing"

* * * * * * * * *

Appendix "E"

Opinion and Judgment of Circuit Court

This is an appeal under the provisions of Title 51 Section 140 Alabama Code of 1940, from the assessment of a franchise tax against appellant, herein called Transco, by the State Department of Revenue purporting to act under the authority of Title 51, Sections 348, et seq., levying an annual franchise tax on foreign corporations doing business in Alabama. Appellant contends that the statute is not by its terms applicable to it in the light of the interstate character of its business, and that if the statute were applicable, it would be unconstitutional.

The case is submitted for final decree on the pleadings and proof as noted. The Court is of the opinion that the complainant is not subject to the franchise tax, and is entitled to the relief praved for.

Findings of Fact by Court

Transco was in 1956 and prior thereto a corporation organized under the laws of Delaware.

Transco was in 1956, and at all times has been, a natural gas company in interstate commerce within the meaning of the Act of Congress known as the Natural Gas Act, 15 U.S.C. 717-717w, and subject to the jurisdiction of the Federal Power Commission (hereinafter called FPC), operating in Alabama and other states solely under certificates of public convenience and necessity issued by the FPC.

Transco has never sought certificates of public convenience and necessity from, or approval of its rates and tariffs by, the State of Alabama or any other state, and the State of Alabama has never asserted any regulatory authority or jurisdiction over any of its rates or practices.

During the year 1956 Transco owned and operated an interstate natural gas transmission system extending from sources of gas supply in Texas and Louisiana through the States of Mississippi, Alabama, Georgia, South Carolina, North Carolina, Virginia, Maryland, Pennsylvania and New Jersey to a terminus at New York City.

On January 1, 1956, the length of Transco's pipeline, with laterals, was approximately 3,087 miles of which approximately 353 miles were located in Alabama. The total capital employed by Transco within the State of Alabama on that date (computed in accordance with the method prescribed for Alabama franchise tax purposes) was $32,750,000, while the total capital employed by Transco everywhere (computed in the same manner) as of the same date was $277,847,352.

As the gas transported and sold by Transco moved through the interstate transmission system, its pressure was gradually lost by friction, requiring the use of compressor stations located at intervals to increase the pressure so that the gas would continue to move. The pressure of the natural gas was increased by 200 to 250 lbs. at each compressor station (the normal pressure on the inlet side in each compressor station being from 550 to 600 lbs. per square inch, and the normal pressure on the outlet side being uniformly 800 lbs. per square

inch). Three compressor stations were owned and operated by Transco in Alabama in 1956: Station 9 near Myrtlewood, Alabama; Station 10 near Billingsley, Alabama; and Station 11 near Wadley, Alabama.

Each compressor station was comprised of several buildings and facilities, such as compressor building, meter building, water tank and houses.

At each compressor station in Alabama Transco used gas from its main pipeline as fuel for the following purposes:

(1) for main compressor engines at Stations 9 and 11 and for steam boiler at Station 10, the steam so generated driving the turbines on the compressor;

(2) for auxiliary engines at Compressor Stations 9, 10 and 11, which engines generated electricity which was used for the sole purpose of providing power at each compressor station, including electric power for the houses at each compressor station and for operation of pumps bringing water from sources of supply to the tanks; and

(3) for heating office, shop and warehouse facilities and houses at each compressor station.

Transco procured water from rivers, creeks, springs or wells on or close to each compressor station in Alabama. The company maintained one or more large tanks at each station for water for domestic and personal use at all buildings which were a part of the station, and also maintained one or more large tanks at Stations 9 and 10 for water necessary for the operation of the station. The water was pumped from the sources of supply to the tanks by pumps

In order to assure the operation of each compressor station it was necessary for trained persons to be readily available for duty at all times. For this purpose, Transco maintained six houses at Compressor station 10 and seven houses at [illegible] respectively stations 9 and 11, respectively. Transco required the superintendent and repair foreman of each station occupy a house and that four houses be occupied by persons [illegible] employed in the operation of the station. Likewise, in order to assure uninterrupted operation of the communication system it was necessary that the communication employee at Station 10 and 11 be readily available at all times for duty or call in the event of an emergency, and for that purpose, Transco required that the communication employee occupy one of the houses at these stations. Transco rented each house to the employee required to live therein for $40 a month and furnished, without charge, to each house electricity generated by Transco [illegible] and by Transco and water from the domestic supply. The rent for each house was less than the annual depreciation.

The construction, ownership and operation of each compressor station and of every building and facility at each compressor station, the use of its own gas, the generation of electricity and the procurement and use of water at each compressor station is a substantial, necessary, integral and inherent part of the interstate transportation of natural gas by Transco in its interstate transmission system.

On January 1, 1956, Transco was not doing any construction work in Alabama and had no contract with any person for the operation for any construction work in Alabama. Pursuant to Transco's application the FPC authorized Transco [illegible]

and operate certain facilities, the FPC finding that such facilities would "constitute an integral part of Transcontinental's interstate transmission system, and the sales proposed to be made . . . are sales in interstate commerce for resale." Transco made in 1956 certain contracts with independent contractors for the work authorized by the FPC. During 1956 Transco had various independent contractors do work in connection with facilities owned and operated by Transco in Alabama. This work was on Transco's existing interstate facilities or on the construction of new facilities which became a necessary, inherent and integral part of Transco's interstate transmission system.

The order of the FPC granting Transco its certificate of public convenience and necessity provided that "Transcontinental is authorized to transport and sell natural gas in interstate commerce" to certain companies and communities, including some in Alabama, and that "Transcontinental shall not transport or sell natural gas to or for any customer except as authorized herein". From time to time, the FPC ordered Transco to serve additional municipal corporations in Alabama. During 1956 Transco sold gas in Alabama to no person, firm or corporation except the following municipal corporations: City of Butler, City of Linden, City of Thomaston, City of Wadesville, City of Rockford, City of Clanton, East Central Alabama Gas District (serving Cities of Ashland, Lineville and Goodwater), City of Alexander City, City of Wadley, City of Roanoke and City of Wedowee. The sale of gas to each was pursuant to and in conformity with orders of the FPC, entered in response to petitions of the purchasers or their official representatives praying mandates directing the sales and facilities used for

deliveries were constructed pursuant to and in conformity with orders of the FPC.

At all times during 1956 Transco had a service agreement with each municipal corporation in Alabama to which it sold gas providing for delivery of the allocation of gas then authorized by the FPC. Each such service agreement provided:

"Pressure

"Seller shall deliver natural gas to Buyer at the Point(s) of Delivery at a pressure(s) of:

Not less than fifty (50) pounds per square inch gauge."

"Incorporation of Rate Schedule and General Terms and Conditions

"This agreement incorporates the applicable provisions of Rate Schedule(s) _____ of Seller and is subject to the provisions of the General Terms and Conditions of Seller's FPC Tariff which Seller has filed or shall file with the Federal Power Commission. Both the Rate Schedules and General Terms and Conditions of Seller's FPC Gas Tariff are made a part hereof by reference."

The "Seller's FPC Tariff" referred to in the aforesaid service agreements is Transco's Tariff issued on October 15, 1950 effective November 15, 1950 (and, as revised and amended still in force and effect), which is on record with the Federal Power Commission under the caption: "Transcontinental Gas Pipe Line Corporation FPC Gas Tariff, Original Volume No. 1". Paragraph numbered 12, which appears on "Original Sheet No. 44" of the said FPC Gas Tariff, Original Volume No. 1 provides:

"12. Pressures

"Seller shall deliver natural gas to Buyer at Seller's line pressure at the Point or Points of Delivery designated in the Service Agreement, but the maximum and minimum pressures may be as agreed upon by Buyer and Seller in the Service Agreement. The minimum pressure shall not be less than fifty (50) pounds per square inch gauge."

During 1956 Transco owned and operated 12 meter stations designed to measure gas delivered to municipalities located in Alabama. Every meter station was as near the main pipeline as prudent engineering, reasonable accessibility and accepted safety practices would permit. All but three of such meter stations were within 100 feet of the pipeline, and the remaining ones were within 210 feet. All facilities to the point of delivery were owned by Transco. All facilities after the point of delivery were owned by the purchaser of the gas. All meter stations and all facilities thereat were necessary, inherent and integral parts of the business of interstate transportation and delivery of natural gas.

Transco has never had any control or interest, direct or indirect, with respect to the design, construction, operation or maintenance of the gas system of any municipality or other operation in Alabama.

The average pressure of the natural gas in the pipeline at each meter station in Alabama and the average pressure at which gas was delivered to each municipal corporation was as follows in 1956

Meter Station	Average Pressure of Gas in Pipeline	Average Pressure at Which Gas was Delivered
Butler	600 psig *	130 psig *
Linden	755 "	158 "
Thomaston	745 "	125 "
Maplesville	560 "	160 "
Clanton	775 "	200 "
Rockford	745 "	100 "
Alexander City	725 "	200 "
(East Central Alabama Gas District)		
Goodwater	725 "	150 "
Ashland-Lineville	675 "	405 "
Wadley	640 "	80 "
Roanoke	685 "	200 "
Wedowee	685 "	125 "

* pounds per square inch gauge

As is indicated in the service agreements and the tariff hereinabove quoted, Transco was prohibited from delivering gas at pressures less than 50 lbs. per square inch gauge. There was, however, no provision in such service agreements or tariffs prohibiting deliveries of gas at higher pressures. Transco's customers are, and at all times have been, on notice that they can be required to take gas at Transco's pipeline pressure. Transco's pressure regulating equipment has been installed, in every meter station, for the sole purpose of permitting accurate measurement of the volumes of gas delivered.

The gas purchased in 1956 by each municipal corporation in Alabama was purchased primarily for resale with small quantities of it being used and consumed by each purchaser other than East Central Alabama Gas District. No municipal corporation, except the City of Butler, used or consumed more than

2% of the gas purchased; in most instances, the amount used and consumed was less than 2%. The City of Butler had leaks in its system, and the exact amount used by it cannot be determined. It is reasonable to conclude, however, that the City of Butler used and consumed a maximum of 2% of the gas purchased and that it probably used or consumed less than 2%.

None of the municipal corporations purchasing gas from Transco in Alabama in 1956 could resell or use the gas at the pressure at which it was received, and each had to further reduce the pressure before reselling or using the gas. The maximum pressure at which each municipal corporation resold or used the gas in 1956 was as follows:

Municipality	Maximum Pressures Expressed in Normal Measurement Terms	Approximate psig Equivalent of Water Column Measurement
City of Butler	6" water column	00.21 psig *
City of Linden	7" water column	00.25 "
City of Thomaston	6" water column	00.21 "
City of Maplesville	5 psig	05.00 "
City of Clanton	15" water column	00.54 "
City of Rockford	7" water column	00.25 "
City of Alexander City	5 psig.	05.00 "
East Central Alabama Gas District	12" water column	00.43 "
City of Wadley	7" water column	00.25 "
City of Roanoke	7" water column	00.25 "
City of Wedowee	7" water column	00.25 "

* pounds per square inch gauge

Transco had in 1956 an integrated VHF mobile and microwave radio-telephone communication system which paralleled its transmission system and was used solely in connection with

the construction, maintenance, and operation of, and was an integral and necessary part of its interstate transmission system.

During 1956 Transco rented buildings, or portions of buildings, in Alabama to house work equipment and a foreman's pickup truck. A pipeline gang worked out of each building or portion thereof. Each pipeline gang was engaged solely in maintenance of a section of the interstate pipeline and the right of way on which this section was located. The work equipment and the pickup truck were used solely in connection with the work of the pipeline gang.

During the same period, Transco also rented two buildings at Alexander City for a district office. The buildings housed district personnel, office equipment, material and small work equipment. The district office was responsible for the maintenance of a section of the interstate pipeline.

Transco rented for approximately two weeks during 1956 a small office in connection with the construction authorized by the FPC and done by independent contractors, and temporarily stored in Alabama pipe to be used in this construction.

Each such building (or portion of a building) and office, the use of each such building and office, and the temporary storage of pipe was a necessary, inherent and integral part of the interstate transportation of natural gas.

Transco maintained during 1956 a small bank account for working funds in each of four banks in Alabama. In connection with the construction work authorized by the FPC, Transco

established two small temporary construction working fund accounts with a bank in Houston, Texas. The working fund construction working fund accounts were established in order to provide a means of local payment of miscellaneous minor items purchased, which could be handled more conveniently on a local basis and were a necessary, inherent and integral part of the transportation of natural gas, or the construction of facilities for such transportation.

On October 3, 1951, Southern Natural Gas Company (hereinafter called Southern) filed with the FPC an application, given Docket No. G-1803, which was amended December 3, 1951 for a certificate of public convenience and necessity authorizing the construction and operation of certain natural gas transmission facilities for the exchange or sale and delivery of natural gas between Southern's pipeline system and Transco's pipeline system. The application as amended proposed to establish, among others, an interconnection between Southern's system and Transco's system on Southern's 18" Gwinville-Selma line near Selma, Alabama.

On October 16, 1951, Transco filed with the FPC an application given Docket No. G-1819, for a certificate of public convenience and necessity authorizing the construction and operation of certain natural gas facilities necessary for Transco to complete the interconnections with Southern's system and to exchange or sell and deliver natural gas by means of said interconnections, which application was supplemented on December 13, 1951. Transco's application as supplemented proposed to establish, among other things, a meter station and

appurtenant facilities on Transco's "30" main transmission pipeline near Selma, Alabama.

On January 18, 1952, the FPC issued its findings and order issuing certificates of public convenience and necessity (Docket Nos. G-1803 and G-1819, 11 F.P.C. 740). Among other things, the Commission found (11 F.P.C. 741) that

> "(1) Southern and Transcontinental, Delaware corporations, having their principal places of business in Birmingham, Alabama, and Houston, Texas, respectively, are engaged in the transportation and sale of natural gas for resale in interstate commerce, subject to the jurisdiction of the Commission and each is a 'natural-gas company' within the meaning of the Natural Gas Act, as heretofore found by the Commission. *In the Matter of Southern Natural Company*, Docket No. G-296, 3 FPC 822, and *In the Matter of Transcontinental Gas Pipe Line Corporation*, Docket No. G-1277.
>
> "(2) The facilities hereinbefore described are proposed to be used in the transportation and sale of natural gas for resale in interstate commerce, subject to the jurisdiction of the Commission, as integral parts of the Applicants' existing pipeline systems and the construction and operation thereof by the Applicants are subject to the requirements of subsections (c) and (e) of Section 7 of the Natural Gas Act."

The Commission ordered, inter alia (11 F.P.C. 741) that

> "(A) Certificates of public convenience and necessity be and the same are hereby issued authorizing Southern and Transcontinental to construct and operate the facilities hereinbefore described, all as more fully described in each of the applications hereinbefore mentioned and the exhibits appended

thereto, for the transportation and sale of natural gas as therein set forth, subject to the pursuit from of the Commission upon the terms and conditions of this order."

Pursuant to the findings and orders of January 18th Transco and Southern constructed the authorized facilities at or near Selma, Alabama. Transco's facilities consisted of four 10" orifice meter stations with necessary pipe, valves and fittings and instruments, partly contained within a 4' x 6' light steel building with 112' of 10" yard pipe connected with Transco's 30" main pipeline. During 1956 the facilities were as originally constructed.

On November 26, 1951, Transco and Southern entered into a contract which was subject to obtaining necessary authorization from the FPC and under which Transco agreed to sell natural gas to Southern.

On November 26, 1951, Southern and Transco entered into a contract which was subject to obtaining necessary authorization from the FPC and under which Southern agreed to sell natural gas to Transco.

During 1956 Transco sold no gas to Southern in Alabama. During the period beginning May 17, 1956, and ending May 29, 1956, and the period beginning June 29, 1956, and ending June 30, 1956, Southern, pursuant to contract of November 26, 1951, sold gas to Transco in Alabama. Transco purchased gas in May and June, 1956, due to temporary shutdown of its transmission system west of Alabama on account of construction or relocation of its system. During said periods Southern sold Transco a

total of 148,242 MCF of natural gas for which Transco paid Southern the sum of $31,068.

All of the natural gas sold in Alabama in 1956 by Southern to Transco was produced in states other than the State of Alabama and brought into the State of Alabama from such other states by Southern's pipeline system, and none of it was produced in the State of Alabama.

The pressure of the gas was not reduced in the course of the delivery from Southern to Transco.

In connection with the construction, maintenance and operation of Transco's interstate transmission system, employees from other states occasionally worked in Alabama in 1956.

Transco has never maintained any general or corporate office in Alabama, nor has it any personnel located in this state who are authorized to solicit business, accept contracts for purchase or sale of gas, settle or adjust accounts, determine managerial policy, or otherwise perform management functions other than those relating solely to the operation, construction and maintenance of its interstate transmission system. In 1956 and prior thereto Transco's statutory domicile was in Delaware and its principle corporate and operating office was in Houston, Texas. Transco maintained records in Alabama showing the time worked by employees in Alabama. At Stations 9, 10 and 11 and at the district office at Alexander City, Transco maintained records pertaining to the bank account used by each. At each compressor station Transco maintained stock records showing supply parts for the station in hand, equipment records showing

equipment in use at the station, maintenance records showing maintenance work done on the equipment at the station, and miscellaneous operating records required by the FPC to be kept at the station. Similar records were maintained by personnel assigned temporarily to construction activities during the limited period of such construction activities. Transco maintained no other records of any type in Alabama.

Transco, of course, had employees in Alabama at all times during 1956. All employees, whether permanently stationed in or temporarily present in Alabama, were engaged solely and directly in the service of constructing, maintaining and operating Transco's interstate transmission system.

Transco had 17 automotive vehicles in Alabama at sometime during the year 1956. The automotive vehicles were used only to carry employees from place to place in connection with their work in the construction, maintenance and operation of the pipeline, to carry needed supplies and for other purposes directly connected with the construction, maintenance and operation of the pipeline.

Transco has paid all ad valorem taxes assessed by proper state authorities on its property located in Alabama, income taxes to the State of Alabama on its net income allocated to business done in Alabama, sales or use taxes on all tangible personal property purchased or used in its interstate activities in Alabama, and unemployment compensation taxes with respect to its employees in Alabama. The amounts paid in 1956 were as follows:

Ad valorem taxes on property	$ 262,289.00
Sales and use taxes	12,971.00
Income tax	1,611.00
Unemployment compensation taxes	1,663.00
Total	$ 278,534.00

The amount of all gross revenues (before deduction of gas purchase costs, operating expenses, maintenance expenses, or any other costs or charges whatsoever) derived by Transco from all Alabama sources during the year 1956 was $284,297.00.

All of the business, activities, and operations of Transco in Alabama are carried on solely in furtherance of and are inherent, integral and necessary parts of the interstate transportation of natural gas. All of the property of Transco located in Alabama, both real and personal, is committed to and used solely in said interstate business. Transco does not, and did not in 1956, engage in any local or intrastate business or activities whatsoever in Alabama.

Transco duly filed, on forms prescribed by the State Department of Revenue, a franchise tax return for the year 1956. After hearing protest on behalf of Transco against the assessment of any franchise tax for the year 1956, a final assessment in the amount of $81,875.00 was made by the State Department of Revenue on the 19th day of March, 1958.

This appeal is before the Court from the final assessment and was duly filed within the time and in the manner prescribed by the statute, Title 51, Section 140, Alabama Code of 1940.

Conclusions of Law

1. Transco duly appealed to this Court from the final assessment of foreign corporation franchise tax (Title 51, Sections 348, et seq., Code 1940) for the year 1956 and this Court has jurisdiction over this suit.

2. The Alabama franchise tax on foreign corporations is not applicable to a foreign corporation which is engaged exclusively in interstate commerce in Alabama, whether or not the corporation has sought and obtained permit to do a local business in Alabama. *State v. Plantation Pipe Line Company*, 265 Ala. 69, 89 So.2d 849 (1956), *cert. den.* 352 U.S. 943, 1 L.Ed.2d 273.

3. The Alabama foreign corporation franchise tax, if applicable to a foreign corporation which is engaged solely in interstate commerce in Alabama in 1956, is unconstitutional. *State v. Plantation Pipe Line Company, supra.*

4. Transco was engaged solely in interstate commerce in Alabama in 1956. As was said in *State v. Plantation Pipe Line Company, supra*: "It cannot be asserted that interstate commerce, to be immune from taxation, must be conducted in some sort of vacuum without tangible property, personnel or incidental activities within the boundaries of the state." All business, activities, and operations of Transco in Alabama were necessary, inherent and integral parts of its interstate transportation and sale of natural gas and cannot realistically be separated from it.

There are no material differences between the facts of this case and those presented in the *Plantation* case. The operative

facts of both cases are substantially identical, and the Court could, with propriety, rest its judgment that Transco was engaged in interstate commerce in Alabama in 1956 on the decision of the Supreme Court in that case. However, the Court has carefully considered the contentions of the State, and compared the facts there and here and in the light of the authorities, it is clear that there is no possibility of a different conclusion here. The controlling cases are: *Spector Motor Service, Inc., v. O'Connor*, 340 U.S. 602, 95 L.Ed. 573 (1951); *Ozark Pipe Line Corporation v. Monier*, 266 U.S. 555, 69 L.Ed. 439 (1925); *United Airlines, Inc., v. Joseph*, 282 App.Div. 48, 121 N.Y.Supp.2d 692 (1953), *affirmed* 307 N.Y. 762, 121 N.E.2d 557 (1954); *Mississippi River Fuel Corporation v. Hoffman*, 4 Ill.2d 468, 123 N.E.2d 503 (1955), *cert. den.* 349 U.S. 935, 99 L.Ed. 1264 (1955); *Texas Gas Transmission Corp. v. Atkins*, 197 Tenn. 123, 270 S.W.2d 384 (1954), *cert. den.* 348 U.S. 883, 99 L.Ed. 694 (1954); *Gay v. United Gas Pipe Line Company*, 159 Fla. 659, 32 So.2d 600 (1947); *Panhandle Eastern Pipe Line Company v. Public Service Commission*, 332 U.S. 507, 92 L.Ed. 128 (1947); and *State Tax Commission of Mississippi v. Interstate Natural Gas Company*, 284 U.S. 41, 76 L.Ed. 156 (1931).

In view of these decisions, it is abundantly clear that Transco was engaged exclusively in interstate commerce in Alabama in 1956. The State, however, has suggested several reasons why it should be held that Transco was engaged in intrastate commerce. An examination of these suggestions reveals that each is without merit.

(a) The State argues that Transco reduced the pressure of gas before delivering it. It was held in *Mississippi River Fuel*

Corporation v. Hoffman, supra, and *Gay v. United Gas Pipe Line Company, supra*, that each gas company was engaged exclusively in interstate commerce although each reduced the pressure of gas before delivery. On this point the State relies primarily upon *East Ohio Gas Company v. Tax Commission of Ohio*, 283 U.S. 465, 76 L.Ed. 1171 (1931), where the Supreme Court held that, under the facts there presented, the gas company was engaged in intrastate commerce. There are two fundamental differences between the facts of the East Ohio case and the present one:

1. Some of the gas sold by East Ohio in Ohio was produced in Ohio and had never left the state, while none of the gas sold by Transco in Alabama was produced in Alabama.

2. The gas was sold by East Ohio to the consumers at burner tip pressure, while here the pressure had to be further reduced by the purchaser before the gas could be used or resold by the purchaser.

Moreover, it is extremely doubtful that the holding in the *East Ohio* case has any present validity. See *Illinois Natural Gas Company v. Central Illinois Public Service Company*, 314 U.S. 498, 86 L.Ed. 371 (1942) and *Panhandle Eastern Pipe Line Company v. Public Service Commission, supra*. In the last cited case gas was sold to an industrial consumer and the pressure reduced before delivery. Yet, the Supreme Court held that such sales were in interstate commerce.

The argument is in any case wholly unrealistic. Interstate commerce must be accomplished in accordance with the state

of the act involved and in a practical, convenient and economical manner. Reduction of pressure is a reasonably and necessary part of interstate delivery. To say that transportation of gas loses its interstate character merely by reduction of pressure for the purpose of delivery is like saying that interstate railroad traffic loses its character unless passengers or freight are thrown off of the trains as they move through the state at 60 miles per hour.

(b) The second argument made by the State is that all gas sold by Transco was not resold by the purchaser. In *State Tax Commission of Mississippi v. Interstate Natural Gas Company, supra,* the Supreme Court held that sales of gas to local distributing companies were sales in interstate commerce. The authority of this case has never been questioned, and its holding has frequently been affirmed by the United States Supreme Court. *Illinois Natural Gas Company v. Central Illinois Public Service Company, supra; Panhandle Eastern Pipe Line Company v. Public Service Commission, supra.* In the last cited case the court said:

> "Thus gas furnished to local utilities for resale is supplied unquestionably both as to transportation and as to sale, in interstate commerce."

The fact that the municipal corporations to whom Transco was ordered to sell gas used or consumed small quantities does not prevent this case from being controlled by *State Tax Commission of Mississippi v. Interstate Natural Gas Company, supra.* Even if the gas was all used or consumed by the purchasers, the sales and transportation would still be in interstate commerce under the decisions in *Mississippi River.*

Fuel Corporation v. Hoffman, supra, Gay v. United Gas Pipe Line Company, supra, Texas Gas Transmission Corp. v. Atkins, supra, and *Panhandle Eastern Pipe Line Company v. Public Service Commission, supra*

(c) A third argument on Behalf of the State is that Plantation was a common carrier, while Transco transported its own product, and as a corollary, Plantation did not sell its product while Transco did. The argument appears to be based on the notion that commerce means only transportation. The fact is, of course, that most commerce involves the purchase and sale of commodities.

Persons transporting their own product, gas, which they sell, can be, and are, engaged exclusively in interstate commerce. In *Mississippi River Fuel Corporation v. Hoffman, supra; Texas Gas Transmission Corporation v. Atkins, supra; Gay v. United Gas Pipe Line Company, supra;* and *Panhandle Eastern Pipe Line Company v. Public Service Commission, supra,* It was held that gas companies transporting natural gas which they owned and which was sold to local utilities for resale, and to industrial customers for consumption, were engaged exclusively in interstate commerce.

As pointed out above, the mere fact that Transco delivers gas in Alabama is obviously immaterial. In *Railway Express Agency, Inc., v. Commonwealth of Virginia,* 347 U.S. 359, 98 L.Ed. 757 (1954), the Supreme Court distinctly said:

> "It is enough to say that we recently have ruled that local incidents such as gathering up or putting down interstate commodities as an integral part of their

interstate movement are not adequate grounds for a state license, privilege or occupation tax."

(d) Another argument made by the State is that Transco received gas from Southern Natural in Alabama.

The fact that Transco received interstate gas from Southern Natural in Alabama at pipeline pressure during one three-day period and one two-day period does not indicate that Transco was engaged in intrastate commerce in Alabama for several reasons:

(1) In the order authorizing the construction of the facilities for exchange of gas between Southern Natural and Transco the FPC found "Southern and Transcontinental . . . are engaged in the transportation and sale of natural gas for resale in interstate commerce" and that "the facilities hereinbefore described are proposed to be used in the transportation and sale of natural gas for resale in interstate commerce".

(2) All of the natural gas sold in Alabama in 1956 by Southern Natural to Transco was produced in states other than the State of Alabama and brought into the State of Alabama from such other states by Southern Natural's interstate pipeline system.

(3) The pressure of the gas was not reduced in the course of the sale from Southern Natural to Transco. The interstate movement of the gas was in no sense broken or interrupted.

(e) A point is made of the fact that Transco produced electricity for its own use from gas owned by it. As is indicated in

the findings of fact above, however, this was but a necessary incident to the requirements of interstate transmission of the gas.

The State relies on *Coverdale v. Arkansas-Louisiana Pipe Line Company*, 303 U.S. 604, 82 L.Ed. 1043 (1938) where Louisiana imposed a license tax of $1 on each horsepower of capacity of machinery or apparatus, known as "prime movers" operated. The gas company obtained gas in Louisiana and transported it by pipeline extending into Texas and Arkansas. According to the Supreme Court, 303 U.S. at 606, 82 L.Ed. at 1046, "Ninety-six and 6 10 per cent. (96.6%) of the gas transported through this line during the fiscal year ended July 31 1933, was delivered outside the State of Louisiana."

The gas could not be transmitted through the pipeline unless it was delivered into the pipeline at a pressure higher than that at which it came from the wells. The gas company maintained at the point of intake into its lines its initial compressor station designed to increase the pressure of the gas. The gas company operated prime movers in connection with its initial compressor station. It was held subject to the tax.

Two fundamental differences between the instant case and the *Coverdale* case are readily apparent:

1. The incidence of the two taxes are not the same. The incidence of the tax in the *Coverdale* case was not on the privilege of doing an interstate business or on interstate commerce but on the operation of the prime movers. The tax in this case is not applicable to foreign corporations engaged exclusively in interstate commerce in Alabama. The fact that a

corporation uses its own product transported in interstate commerce to produce electricity to operate a compressor station necessary to further transport its own product in interstate commerce does not indicate that such corporation is engaged in intrastate commerce, and the *Coverdale* case does not hold to the contrary.

2. In the *Coverdale* case the gas company apparently sold in Louisiana gas produced there. This was the doing of an intrastate business. In this case Transco does not sell or transport in Alabama any gas produced here.

Moreover, the *Coverdale* case was decided during the brief period when the "cumulative burdens" test of determining the validity of a tax was a predominant consideration with a majority of the justices. Recent decisions of the Supreme Court indicate that this test is no longer of controlling significance.

(f) The State further argues that, since Alabama could regulate certain rates of Transco, e.g., sales to industrial consumers, by virtue of the fact that Congress expressly left such regulation to the state under the Natural Gas Act, the State can also impose a franchise tax on Transco. This argument is completely answered in the *Hoffman* case as follows:

> "Appellants have allowed themselves to become confused between interstate commerce in its constitutional aspect and that part of interstate commerce which Congress chose to take under Federal regulation by the Federal Natural Gas Act of 1938, 15 U.S.C.A. §717 et seq. In that act Congress gave to the Federal Power Commission power to regulate rates and all other aspects of sales of gas by interstate pipelines to purchasers for resale, the purchasers being, in general,

local public utility companies. But in that act Congress refrained from giving to the Federal Power Commission power to regulate the rates for gas sold by interstate pipelines to customers who took gas for their own use. (See Panhandle case.) *But this statutory distinction which Congress elected to make certainly did not mean, as appellants seem to deduce, that the sales for resale were sales in interstate commerce while the sales to industries for their own use were not. . . .*" (Emphasis supplied)

The conclusion is inescapable, on this record, that Transco was engaged exclusively in interstate commerce in Alabama in 1956.

5. It follows that Transco did not owe any franchise tax to the State of Alabama for the year 1956 and that the assessment was invalid in its entirety.

Judgment

It is, therefore, ORDERED, ADJUDGED and DECREED:

1. The assessment of franchise tax against appellant for the year 1956 made by the State Department of Revenue is invalid in its entirety.

2. The principal and surety on the bond given in this case pursuant to statute be and each hereby is discharged from all liability.

3. The costs herein accrued be and the same hereby are taxed against the State of Alabama.

DONE and ORDERED this 24 day of February, 1959.

s/ Walter B. Jones

Circuit Judge

Appendix "F"

Title 51, Section 348, as Amended, Code of Alabama 1940:

"§ 348. Amount of Levy on Foreign Corporations.—Every corporation organized under the laws of any other state, nation or territory and doing business in this state, except strictly benevolent, educational or religious corporations, shall pay annually to the state an annual franchise tax of two and one-half dollars ($2.50) on each one thousand dollars ($1,000.00) of the actual amount of capital employed in this state. In ascertaining the annual franchise tax which will be paid by any foreign corporation doing business in this state under this section there shall be deducted from the amount of the capital employed by such corporation in this state the aggregate amount of loans of money made by such corporation in this state and which shall be secured by existing mortgage or mortgages to it on real estate in this state and upon which mortgage or mortgages there shall have been paid the recording privilege tax provided by law. Provided, that if a corporation has qualified to do business in this state it shall for the purpose of franchise tax prima facie be held to be doing business in the State of Alabama within the meaning of this title."

Appendix "G"

Constitution of Alabama of 1901, Article 12, Section 232:

"Sec. 232. No foreign corporation shall do any business in this state without having at least one known place of business and an authorized agent or agents therein, and without filing with the secretary of state a certified copy of its articles of incorporation or association. Such corporation may be sued in any county where it does business, by service of process upon an agent anywhere in the state. The legislature shall, by general law, provide for the payment to the State of Alabama of a franchise tax by such corporation, but such franchise tax shall be based on the actual amount of capital employed in this state. Strictly benevolent, educational or religious corporations shall not be required to pay such a tax."

Appendix "H"

Constitution of the United States, Article I, Section 8, Clause 3

"Section 8. The congress shall have power: —. . .

* * * * * * * *

"To regulate commerce with foreign nations, and among the several states, and with the Indian tribes;"

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1960.

No. 547.

STATE OF ALABAMA,
Petitioner,

vs.

TRANSCONTINENTAL GAS PIPE LINE CORPORATION,
a Corporation,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Alabama.

BRIEF FOR RESPONDENT IN OPPOSITION.

SAMUEL M. JOHNSTON,
P. O. Box 550,
Mobile 4, Alabama,
JOS. F. JOHNSTON,
E. T. BROWN, JR.,
902 First National Building,
Birmingham 3, Alabama,
Counsel for Respondent.

JOHNSTON, McCALL & JOHNSTON,
P. O. Box 550,
Mobile 4, Alabama,
CABANISS & JOHNSTON,
902 First National Building,
Birmingham 3, Alabama,
Of Counsel.

St. Louis Law Printing Co., Inc., 415 N. Eighth Street. CEntral 1-4477.

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State Tax Commission of Mississippi v. Interstate Natural Gas Co., Inc., 284 U. S. 41 (1931) 7, 8

State Tax Commission v. Van Cott, 306 U. S. 511 (1939) 7

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1960.

No. 547.

STATE OF ALABAMA,
Petitioner,

vs.

TRANSCONTINENTAL GAS PIPE LINE CORPORATION,
a Corporation,
Respondent.

On Petition for a Writ of Certiorari to the
Supreme Court of Alabama.

BRIEF FOR RESPONDENT IN OPPOSITION.

Respondent, Transcontinental Gas Pipe Line Corporation, respectfully says that the petition for writ of certiorari should be denied.

SUMMARY STATEMENT OF REASONS FOR DENIAL OF THE WRIT.

This case involves solely the interpretation and application of a state tax statute to the facts as found by the state courts. Both the Circuit Court[1] and the Supreme Court of Alabama[2] held that this case is controlled by the deci-

[1] Appendix E to Petition at 50.

[2] 123 So. 2d at 178, Appendix A to Petition at 38.

sion in *State v. Plantation Pipe Line Co.*, 265 Ala. 69, 89 So. 2d 549 (1956), as to which this Court denied certiorari.[3]

This case presents no substantial federal question, and this Court need go no further than to scan the clear and short opinion of the Supreme Court of Alabama to see this. Accordingly, this reply will deal very briefly with the statement and arguments of the petitioner herein.

OPINION BELOW.

The opinion of the Alabama Supreme Court is unofficially reported at 123 So. 2d 172.

PETITIONER'S STATEMENTS OF JURISDICTION AND OF THE QUESTIONS PRESENTED ARE NOT ACCURATE.

Although not an appeal case, the petition purports to state a case of constitutional jurisdiction on the ground that "the validity of a state statute . . . has been drawn in question on the grounds that as so applied it is unconstitutional . . . ."[4]

The decision below is not a holding that the state statute is invalid, if such is the meaning of this statement, and the petition's statements as to the questions presented are likewise inaccurate.

QUESTIONS PRESENTED.

The Alabama Supreme Court accurately and succinctly stated the three questions presented to it as follows:

> "1. Does The Alabama Foreign Corporation Franchise Tax apply to a foreign corporation engaged solely in *interstate* commerce in Alabama?

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[3] State v. Plantation Pipe Line Co., 352 U. S. 943 (1956).

[4] Petition at 2.

"2. If the tax is applicable to a foreign corporation doing solely an interstate business in this state, is it violative of the commerce clause of the Federal constitution?

"3. Was Transcontinental Gas engaged solely in interstate commerce in Alabama in 1956?"[5]

As to the first question, it held:

"The first of these questions has been answered in the negative in *State v. Plantation Pipe Line Company*, 265 Ala. 69, 89 So. 2d 549, where this court after reviewing the history of the Foreign Corporation Franchise Tax law of this state held:

> "'The Alabama franchise tax on foreign corporations is not applicable to foreign corporations doing an exclusively interstate business in Alabama.'"[6]

As to the second question, its only comment, which immediately followed the last quotation, was:

"There is no occasion, then, to consider anew the second question outlined above. It, too, has been answered in the *Plantation* case, *supra*."[7]

As to the third question, it held:

"We are of the opinion that the facts of this case indicate that appellee was engaged exclusively in interstate commerce in Alabama in 1956.—*Spector Motor Service, Inc., v. O'Connor*, 340 U. S. 602, 95 L. Ed. 573; *Ozark Pipe Line Corporation v. Monier*, 266 U. S. 555, 69 L. Ed. 439; *United Air Lines, Inc., v. Joseph*, 282

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[5] 123 So. 2d at 175, Appendix A to Petition at 32.

[6] 123 So. 2d at 175, Appendix A to Petition at 32.

[7] 123 So. 2d at 175, Appendix A to Petition at 32.

App. Div. 48, 121 N. Y. Supp. 2d 692, aff'd 307 N. Y. 762, 121 N. E. 2d 557.

"We find no controlling difference between the facts here and the facts of the *Plantation* case, *supra*, decided by this court in 1956. We entertain the view, therefore, that the decision of the trial court was correct."[8]

On the issues presented, it is clear that the holdings with respect to the first and third questions effectively disposed of the entire case.

The Alabama Supreme Court did not announce a holding with respect to the second question; it merely stated that "[t]here is no occasion, then, to consider anew the second question outlined above."[9] This was appropriate in light of its previous holding on the first question. The reference to *State v. Plantation Pipe Line Co.*, 265 Ala. 69, 89 So. 2d 549 (1956), where it was held that "[t]he Alabama franchise tax if applicable to a foreign corporation engaging exclusively in interstate commerce in Alabama would be unconstitutional"[10] does not constitute a holding on the question. It is clear that the Alabama Supreme Court dealt with the constitutional question only hypothetically and in passing, and independently of the other questions. The decision of the second question was not required for and is not a basis of, the disposition of this case by the Alabama Supreme Court. This is made apparent by Mr. Justice Lawson's concurring remarks in the *Plantation* case:

". . . . Since the Court holds those statutes to be applicable only to intrastate business and that the taxpayer is engaged exclusively in interstate business,

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[8] 123 So. 2d at 178, Appendix A to Petition at 38.

[9] 123 So. 2d at 175, Appendix A to Petition at 32.

[10] 265 Ala. at 80, 89 So. 2d at 562.

there is no occasion to write to the constitutional question . . . ."[11]

There is, thus, no question in this case properly cognizable by this Court.

STATEMENT OF FACTS.

Petitioner's statement of facts is argumentative, misleading and omissive. Since the responsibility for reviewing the facts found is not a function of this Court in this case, since the trial court made detailed findings of fact[12], and since the Alabama Supreme Court, accepting the determination of the trial court, accurately summarized the facts,[13] no additional statement is here attempted.

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[11] 265 Ala. at 92, 89 So. 2d at 569

[12] Appendix E to Petition at 43-58

[13] Appendix A to Petition at 26-31

ARGUMENT.

In *State v. Plantation Pipe Line Co.*, 265 Ala. 69, 89 So. 2d 549 (1956), the Alabama Supreme Court considered, with respect to Plantation, the identical questions presented in this case with respect to respondent. The *Plantation* decision, as does the instant decision, rejected the arguments of petitioner. In the *Plantation* case the State filed a petition for writ of certiorari in this Court, which was denied. *State v. Plantation Pipe Line Co.*, 352 U. S. 943 (1956). The instant case, thus, represents an attempt on the part of petitioner to relitigate issues previously decided.

The sole basis for this petition is the attempt on the part of petitioner to have this Court undertake to review the decision of the Alabama Supreme Court construing the Alabama foreign corporation franchise tax and applying it to the particular facts of the respondent's business as found by the courts below.

The State would have this Court review the findings of both the Alabama Supreme Court and the trial court that respondent was engaged only in interstate commerce in Alabama. This is basically a determination of fact. If this finding were made the basis of a holding necessary to the ultimate decision, that the state statute was applicable and, as so applied, inhibited by the Commerce Clause, it would be subject to independent review by this Court as a necessary part of its determination of a properly presented federal question. But the finding below as to the nature of respondent's business was made by both the Alabama Supreme Court and the trial court as an inherent part of, and basis for, the construction and application of the state statute, and whether it was right or wrong is of no concern to this Court.

In *State Tax Commission v. Van Cott*, 306 U. S. 511 (1939), this Court said:

> " . . . . If the Court were only incidentally referring to decisions of this Court in determining the meaning of the State law, and had concluded therefrom that *the statute was itself intended to grant exemption to respondent*, this Court would have no jurisdiction to review that question.[14] (Emphasis added.)

That is exactly the situation here.

In any event the unanimous conclusion of the state judges, who considered the undisputed facts of record here, that respondent was not engaged in intrastate business within the intent of the state statute, is so clearly correct as to be beyond reasonable debate.

Respondent sold gas in Alabama only to 13 municipal corporations. As stated by the Alabama Supreme Court:

> "The gas purchased in 1956 by each municipal corporation in Alabama was purchased primarily for resale with small quantities of it being used and consumed by each purchaser. No municipal corporation used more than 2% of the gas purchased."[15]

In *State Tax Commission of Mississippi v. Interstate Natural Gas Co., Inc.*, 284 U. S. 41 (1931), this Court held that a natural gas company engaged in transporting, selling and delivering gas to local distributing companies for resale was engaged in interstate commerce. The authority of this case has never been questioned, and its holding has frequently been affirmed. *Illinois Natural Gas Co. v. Central Illinois Public Service Co.*, 314 U. S. 498 (1942); *Panhandle Eastern Pipe Line Co. v. Public Service Commission of Indiana*, 332 U. S. 507 (1947). In the last cited case this Court said:

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[14] 306 U. S. at 514.

[15] 123 So. 2d at 174, Appendix A to Petition at 29.

> "Thus gas furnished to local utilities for resale is supplied unquestionably, both as to transportation and as to sale, in interstate commerce."[16]

The fact that the municipal corporations to whom respondent sold gas used or consumed small quantities does not prevent this case from being controlled by *State Tax Commission of Mississippi v. Interstate Natural Gas Co., Inc., supra.*

Even if all the gas were used or consumed by the purchasers, its transportation, sale and delivery was still in interstate commerce. *Panhandle Eastern Pipe Line Co. v. Public Service Commission of Indiana, supra*; *Mississippi River Fuel Corp. v. Hoffman*, 4 Ill. 2d 468, 123 N. E. 2d 563 (1955), *cert. den.*, 349 U. S. 935 (1955); *Texas Gas Transmission Corp. v. Atkins*, 197 Tenn. 123, 270 S. W. 2d 384 (1954), *cert. den.*, 348 U. S. 883 (1954), and *Gay v. United Gas Pipe Line Co.*, 159 Fla. 659, 32 So. 2d 600 (1947).

The primary thrust of petitioner's argument, that respondent was engaged in intrastate commerce in Alabama, is that respondent not only transported the gas but also sold it. Petitioner, however, does not cite a single case from this or any other court to support this unique thesis. Both the Alabama Supreme Court and the trial court considered and rejected the identical argument. The Alabama Supreme Court said:

> ". . . . The trial court was of the opinion, and we are agreed, that commerce is not limited to transportation. In the language of the trial court: 'Persons transporting their own product, gas, which they sell, can be, and are, engaged exclusively in interstate commerce' . . . ."[17]

This conclusion is so plainly sound that citation of authority is a waste of time; however, the following cases

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[16] 332 U. S. at 513.

[17] 123 So. 2d at 177, Appendix A to Petition at 37.

inter alia, hold that gas companies which transported natural gas owned by them, which sold the gas to local utilities for resale and to industrial users for consumption, and which delivered the gas at reduced pressure to the purchasers, were engaged in interstate commerce: *Panhandle Eastern Pipe Line Co. v. Public Service Commission of Indiana, supra; Mississippi River Fuel Corp. v. Hoffman, supra; Texas Gas Transmission Corp. v. Atkins, supra;* and *Gay v. United Gas Pipe Line Co., supra.*

Petitioner suggests that *East Ohio Gas Co. v. Tax Commission of Ohio*, 283 U. S. 465 (1931), and *Southern Natural Gas Corp. v. State*, 301 U. S. 148 (1937), compel the conclusion that respondent was engaged in intrastate commerce in Alabama. An examination of these cases reveals not only that they are factually inapplicable to this case but also that there is grave doubt as to their present validity.

In the *East Ohio* case this Court held that East Ohio was engaged in intrastate commerce. The following facts were present in that case but are not present in the instant case:

1. Some of the gas sold in Ohio by the gas company was produced by it in Ohio.

2. The gas company was engaged in the business of furnishing natural gas under local franchises.

3. The gas company's mains extended to the premises of the ultimate consumers, including homeowners, in more than 50 municipalities in Ohio.

4. The gas company delivered the gas at burner tip pressure.

In the *Southern Natural* case this Court held that the gas company was engaged in intrastate commerce. Two facts were present in that case but not in the instant case:

1. Southern Natural reduced the pressure at the point of delivery for the accommodation of the purchaser to meet its needs and requirements.

2. Southern Natural agreed to establish the requisite service lines running to the described plants in order that the gas might be furnished in a manner suited to the consumer's needs.

These distinctions are obviously pertinent. The *East Ohio* case was distinguished in *Memphis Natural Gas Co. v. McCauless*, 180 Tenn. 688, 177 S. W. 2d 841 (1944), *cert. den.*, 323 U. S. 785 (1944), and *Texas Gas Transmission Corp. v. Atkins*, 197 Tenn. 123, 270 S. W. 2d 384 (1954), *cert. den.*, 348 U. S. 883 (1954), on the ground that "the distribution of gas through service pipes in a particular locality and sale at the burner tips was intrastate commerce."[18] *Sinclair Pipe Line Co. v. Carpentier*, 10 Ill. 2d 300, 140 N. E. 2d 115 (1957), distinguished the *Southern Natural* case on the ground that Southern Natural engaged in local activities "by reducing the pressure of the gas at the point of delivery to meet the needs and requirements of local purchasers and by establishing local lines for their convenience."[19] The *Southern Natural* case was likewise distinguished in *Memphis Natural Gas Co. v. McCauless*, *supra*, on the ground that Southern Natural had service pipes running to the premises of the consumer.

It is extremely doubtful that the holding in the *East Ohio* case has any present validity. This Court characterized the test employed in the *East Ohio* case for determining when interstate commerce ended and intrastate commerce began as "n chanical" in *Illinois Natural Gas Co. v. Central Illinois Public Service Co.*, *supra*, and held in *Panhandle Eastern Pipe Line Co. v. Public Service Commission of Indiana*, *supra*, that such mechanical considerations are no longer effective, if ever they were exclusively. In the last cited case gas was sold to an industrial con-

[18] 177 S. W. 2d at 843, 270 S. W. 2d at 386.

[19] 140 N. E. 2d at 122.

sumer and the pressure reduced before delivery. Yet, this Court held that such sale was in interstate commerce.

While recognizing that the Federal Natural Gas Act, 15 U. S. C., § 717, et seq., is a regulatory law and that "[i]t is doubtful that it applies to taxation at all",[20] petitioner discusses that act and various decisions rendered thereunder. Petitioner points out that Congress gave the Federal Power Commission power over rates and other aspects of sales of gas by interstate pipelines to purchasers for resale and that Congress refrained from giving the Federal Power Commission power to regulate the rates of gas sold by interstate pipelines to customers for their own use. Petitioner then indirectly and incorrectly suggests that, therefore, sales to customers for their own use are intrastate sales. A similar suggestion was flatly rejected in *Mississippi River Fuel Corp. v. Hoffman*, 4 Ill. 2d 468; 123 N. E. 2d 503 (1955), *cert. den.*, 349 U. S. 935 (1955), where the Illinois Supreme Court said:

> " . . . . But this statutory distinction which Congress elected to make certainly did not mean, as appellants seem to deduce, that the sales for resale were sales in interstate commerce while the sales to industries for their own use were not. . . . "[21]

This court, moreover, held in *Panhandle Eastern Pipe Line Co. v. Public Service Commission of Indiana*, *supra*, that the sales to industrial consumers were sales in interstate commerce. This case and others cited by petitioner do not hold, as implied by petitioner, that the sales here involved were not in interstate commerce.

In addition, petitioner's argument assumes that the sales involved in the instant case were sales for consumption. As previously shown, the sales were primarily for

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[20] Petition at 10.

[21] 123 N. E. 2d at 507.

resale and the purchasers used or consumed small quantities of the gas, no purchaser using more than 2% of the gas purchased.

The above cases demonstrate that the unanimous conclusion of the state judges below, who considered the undisputed facts of record here, that respondent was not engaged in intrastate business within the scope of the state statute, is clearly correct. This conclusion is not in conflict with any decision of this Court, or with any comparable decision of any other court, either federal or state.

CONCLUSION.

The petition for certiorari should be denied.

Respectfully submitted,

SAMUEL M. JOHNSTON,
P. O. Box 550,
Mobile 4, Alabama.

JOS. F. JOHNSTON,
E. T. BROWN, JR.,
902 First National Building,
Birmingham 3, Alabama.
Counsel for Respondent.

JOHNSTON, McCALL & JOHNSTON,
P. O. Box 550,
Mobile 4, Alabama.
CABANISS & JOHNSTON,
902 First National Building,
Birmingham 3, Alabama.
Of Counsel.

Certificate of Service.

I, Jos. F. Johnston, one of the attorneys for Transcontinental Gas Pipe Line Corporation, respondent herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the ... day of December, 1960, I served copies of the foregoing Brief for Respondent in Opposition on the State of Alabama, petitioner herein, by mailing copies in duly addressed envelopes, with first class postage prepaid, to its respective attorneys of record as follows:

MacDonald Gallion, Attorney General for Alabama, Montgomery, Alabama;

Guy Sparks, Executive Assistant to the Commissioner of Revenue, and Special Assistant Attorney General, State Department of Revenue, Montgomery, Alabama;

William H. Burton, Counsel, Revenue Department, and Assistant Attorney General, State Department of Revenue, Montgomery, Alabama.

.....

902 First National Building,
Birmingham 3, Alabama,
Attorney for Respondent.